

FILED BY CLERK

MAR 25 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0294-PR
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MARTIN SOTO-FONG,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-39599

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Martin Soto-Fong

Buckeye
In Propria Persona

ESPINOSA, Presiding Judge.

¶1 Petitioner Martin Raul Soto-Fong was convicted after a jury trial of three counts of first-degree murder, one count of armed robbery, two counts of attempted armed robbery, one count of aggravated robbery, and two counts of attempted aggravated robbery. He was sentenced to death for the murders and aggravated prison terms on the remaining convictions. The supreme court affirmed Soto-Fong's convictions and the

sentences imposed. *State v. Soto-Fong*, 187 Ariz. 186, 211, 928 P.2d 610, 635 (1996). He then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court denied.

¶2 Thereafter, based on the United States Supreme Court’s decision in *Roper v. Simmons*, 543 U.S. 551 (2005), the trial court vacated the death sentences in a second post-conviction proceeding and resentenced Soto-Fong to consecutive life terms of imprisonment, but rejected additional claims he had raised in his Rule 32 petition. This court affirmed and denied relief in his consolidated appeal from the resentencing and petition for review of the denial of post-conviction relief. *State v. Soto-Fong*, Nos. 2 CA-CR 2006-0091, 2 CA-CR 2006-0056-PR (consolidated) (memorandum decision filed May 3, 2007). Thereafter, Soto-Fong again sought post-conviction relief, which the trial court denied summarily. This petition for review followed. Absent an abuse of discretion, we will not disturb the trial court’s ruling. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶3 Dismissing Soto-Fong’s petition for post-conviction relief, the trial court found he had “presented no arguments or issues which have not previously been addressed and ruled on by this court. The issues are therefore precluded.” *See* Ariz. R. Crim. P. 32.2(a)(2) (precluding relief on any ground “[f]inally adjudicated on the merits on appeal or in any previous collateral proceeding”). The court added that Soto-Fong was “entitled to raise any issue which the rules exempt from preclusion, and is free to investigate these issues at his own expense. He has not done so.” *See* Ariz. R. Crim. P.

32.2(b). The court then denied Soto-Fong's three-part request for an order directing the state to disclose any exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); require the Pima County Attorney's office to state whether it was investigating or had investigated the involvement of Carole Grijalva in the murders and disclose the results of any such investigation to Soto-Fong; and to set an evidentiary hearing on his claims for relief.

¶4 On review, Soto-Fong has not persuaded us the trial court erred in finding the claims precluded.¹ We note in particular that, as Soto-Fong concedes, he raised a claim of actual innocence based on Grijalva's involvement in the murders in his previous petition for post-conviction relief; he admits that, "[a]fter diligent efforts, [his] counsel [had been] unable to speak with Ms. Grijalva, who was facing first[-]degree murder charges, or obtain her statements from other sources," and concedes he previously had requested "discovery needed to investigate this critical exculpatory evidence." Moreover, Soto-Fong's challenge to the constitutionality of sentencing "[a]n [i]nnocent [p]erson" to consecutive life terms of imprisonment is facially without merit; the jury found him guilty of the murders and the life terms are lawful.

¶5 Soto-Fong has not otherwise established the court abused its discretion. The requests for further discovery not only were asserted previously but they are not separately cognizable claims under Rule 32. Moreover, the right to disclosure and to

¹We note that Soto-Fong erroneously characterizes his December 2008 petition for post-conviction relief as an "of-right" petition; but only defendants who plead guilty are permitted to file what has been designated by Rule 32.1 as an "of-right" petition.

conduct discovery “applies only to the trial stage, not to [post-conviction relief] proceedings.” *Canion v. Cole*, 210 Ariz. 598, ¶ 9, 115 P.3d 1261, 1262 (2005). Although a trial judge has the authority to grant discovery requests in such proceedings and may do so “upon a showing of good cause,” it is a decision for the trial court to make in the exercise of its discretion. *Id.* ¶ 10. In this context, Soto-Fong has not shown the court abused its discretion by denying his request for discovery.

¶6 We summarily reject Soto-Fong’s assertion that the trial judge was biased against him. This court addressed and rejected Soto-Fong’s claim in our memorandum decision in the consolidated appeal and petition for review. *Soto-Fong*, Nos. 2 CA-CR 2006-0091, 2 CA-CR 2006-0056-PR, ¶¶ 5-11. Soto-Fong has presented no new or additional evidence that the trial judge was biased against him. Finally, Soto-Fong has not persuaded us the trial court abused its discretion in finding he had failed to raise a colorable claim for relief warranting an evidentiary hearing.

¶7 We grant the petition for review but for the reasons stated, we deny relief.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge